

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN M. POTTS

Claimant

VS.

PRAIRIE BAND POTAWATOMI NATION

Respondent

AND

FIRST NATIONS

Insurance Carrier

Docket No. 1,004,201

ORDER

Respondent appealed Administrative Law Judge Bryce D. Benedict's August 30, 2002, preliminary hearing Order.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for medical treatment and temporary total disability compensation for a low back injury he suffered while working for the respondent on May 24, 2001.¹ The ALJ concluded that the respondent's purchase of a workers compensation insurance policy constituted a limited waiver of respondent's sovereignty. Thus, the Kansas Workers Compensation Act (KWCA) applied and the Division of Workers Compensation (Division) had jurisdiction to adjudicate claimant's workers compensation claim.

But respondent argues that it is a federally recognized Indian tribe accorded sovereign immunity. Thus, the respondent contends it is not a covered employer under the KWCA and the Division lacks jurisdiction to adjudicate the claim.

¹ P.H. Trans. at 43. The claimant testified that the date of accident was May 24, 2001, instead of May 26, 2001, as contained in his application for hearing filed May 30, 2002.

In contrast, the claimant requests the Appeals Board (Board) to affirm the preliminary hearing Order. Claimant argues the respondent waived its sovereign immunity by purchasing the workers compensation insurance policy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record, and considering the parties' briefs, the Board makes the following findings and conclusions:

In respondent's application for review, it also raised the issues of accidental injury arising out of and in the course of employment, claimant's entitlement to temporary total disability compensation and medical treatment. But the only issue respondent argued in its brief was the issue of whether the parties were subject to KWCA and whether the Division had jurisdiction to adjudicate the claim. The Board will first address that dispositive issue.

The subject preliminary hearing was held on August 2, 2002. At the preliminary hearing, the respondent appeared specially having filed a Motion to Dismiss arguing the Division lacked jurisdiction over the parties and the subject matter of the claim.

On May 24, 2001, claimant injured his low back while working for the respondent. Respondent, Prairie Band Potawatomi Nation (Nation) is a federally organized Indian tribe with a reservation in northeast Kansas.² On the date of claimant's injury, he was working as a land laborer. Claimant is an American Indian and a member of the Prairie Band Potawatomi Nation.³

Respondent is a sovereign American Indian Nation. As a sovereign nation, respondent is not subject to suit without its consent or its waiver of sovereign immunity.⁴ In his August 30, 2002, preliminary hearing Order, the ALJ awarded claimant workers compensation benefits after determining the parties were subject to the KWCA and the Division had jurisdiction to adjudicate the claim. The ALJ based his jurisdictional decision on his conclusion that respondent waived its sovereign immunity when it purchased an insurance policy providing for payment of compensation for work-related injuries consistent with Kansas law. Respondent appealed. For the following reasons, the Board reverses the ALJ's Order.

² Motion to Dismiss, Affidavit of Zach Pahmahmie.

³ P.H. Trans. at 40.

⁴ *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890, 106 S.Ct. 2305, 2312-2313, 90 L.Ed.2d 881 (1998).

Respondent's insurance policy provided for payment of compensation for work-related injuries consistent with Kansas law. But in order to relinquish its sovereign immunity as an American Indian Nation under such policy, respondent's waiver had to be "clear" and "unequivocal."⁵ Respondent's insurance policy did not clearly and unequivocally state that an injured worker's claim would be adjudicated by the Division. Instead, the insurance policy simply entitled respondent's employees when injured while employed by respondent compensation benefits received by other injured Kansas employees. Accordingly, unlike the ALJ, the Board is not satisfied that respondent waived, with the requisite clarity, its sovereign immunity from suit under the KWCA.⁶

The ALJ relied on the Board's decision in *Schneider v. Paul Hensleigh*, No. 170,986, 1994 WL 749207 (Kan. WCAB, Sep. 30, 1998), to support his decision. In that case, the Board held that claimant's claim was subject to the KWCA even though the respondent was not required to purchase workers compensation insurance because claimant's employment was specifically exempted from the KWCA. Despite the fact that respondent had not filed an election to come under the KWCA, the Board found the KWCA did apply under the theory of liberal construction because the employer had represented to claimant it would procure such insurance and, in fact, did so.

The Board finds the *Schneider* decision is not applicable to the facts of this case. In *Schneider*, the employer and the injured employee were located in Kansas and the accident occurred in Kansas. Thus, the Division had jurisdiction to adjudicate whether the KWCA applied to the parties. Here, the employer is a sovereign American Indian Nation, the injured employee is an American Indian and the accident occurred on the sovereign Nation's reservation. And for such an entity to come within the provisions of the KWCA, as a matter of law, its waiver of sovereign immunity must be clearly expressed.

The Board concludes that the ALJ erred when he determined the parties were subject to the KWCA and the Division had jurisdiction to adjudicate the claim. Since the parties are not subject to the KWCA, all other issues raised by the respondent are moot.

⁵ *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); See also *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir.1994) (suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress); *Hartman v. Golden Eagle Casino, Inc.*, ___ Fed. Supp. 2d ___, 2003 WL 259015 (D.Kan. 2003) (Indian tribes, as sovereigns, have power to establish the rights of their employees; for their employees to have any rights, the tribe must either waive sovereign immunity or Congress must abrogate it).

⁶ See *White Mountain Apache Tribe v. Indus. Com'n*, 144 Ariz. 129, 696 P2d 223 (1985) (purchase of workers' compensation insurance by the Arizona Indian tribe, which by its terms made applicable Arizona's state compensation laws, did *not* constitute waiver of the tribe's sovereign immunity from state law and its Industrial Commission); See also *Hartman v. Golden Eagle Casino, Inc.*, ___ Fed. Supp.2d ___, 2003 WL 259015 (D. Kan. 2003) (Gaming Compact, which by its terms made applicable Kansas compensation laws, simply entitled gaming employees to the same workers compensation benefits received by other employees in Kansas).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Bryce D. Benedict's August 30, 2002, preliminary hearing Order, is reversed and the claim is dismissed.

IT IS SO ORDERED.

Dated this _____ day of March 2003.

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation